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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 120604138-2672-02]

RIN 0648-BC21

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Interim final rule; request for comments.

SUMMARY: This interim final rule reopens a portion of the Georges Bank Closed Area to the harvest of Atlantic surfclams and ocean quahogs. The area has been closed since 1990 due to the presence of toxins known to cause paralytic shellfish poisoning. The reopening is based on a request from the Mid-Atlantic Fishery Management Council and the recent adoption of a testing protocol into the National Shellfish Sanitation Program.

DATES: Effective January 1, 2013. Comments must be received by [insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: An environmental assessment (EA) was prepared for this action that describes the final action and other alternatives considered and provides an analysis of the impacts of the measures and alternatives. Copies of the EA are available on request from the NMFS Northeast Regional Administrator, John K. Bullard, 55 Great Republic Drive, Gloucester, MA 01930. The

EA is also available online at <http://www.nero.noaa.gov/> You may submit comments on this document, identified by NOAA-NMFS-2012-0121 by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal e-Rulemaking Portal www.regulations.gov. To submit comments via the e-Rulemaking Portal, first click the “submit a comment” icon, then enter NOAA-NMFS-2012-0121 in the keyword search. Locate the document you wish to comment on from the resulting list and click on the “Submit a Comment” icon on the right of that line.
- Mail: Submit written comments to John K. Bullard, Regional Administrator, Northeast Region, NMFS, 55 Great Republic Drive, Gloucester, MA 01930-2298. Mark on the outside of the envelope, “Comments on GB PSP Closed Area Reopening.”
- Fax: (978) 281-9135; Attn: Jason Berthiaume

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word or Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Jason Berthiaume, Fishery Management Specialist, phone (978) 281-9177, fax (978) 281-9135.

SUPPLEMENTARY INFORMATION:

Background

The Georges Bank (GB) Closed Area, located in the Exclusive Economic Zone east of 69°00' W. long. and south of 42°20' N. lat., has been closed to the harvest of surfclams and ocean quahogs since 1990 due to red tide blooms that cause paralytic shellfish poisoning (PSP). The closure was implemented based on advice from the U.S. Food and Drug Administration (FDA) after samples tested positive for toxins (saxitoxins) that cause PSP. These toxins are produced by the alga Alexandrium fundyense, which can form blooms commonly referred to as red tides, or harmful algal blooms, and can accumulate in water column filter-feeding shellfish. Shellfish contaminated with the toxin, if eaten in large enough quantity, can cause illness or death in humans.

Due to inadequate testing or monitoring of the water and shellfish within the area for the presence of PSP-causing toxins, the closure was made permanent in 1999, under Amendment 12 to the Atlantic Surfclam and Ocean Quahog Fishery Management Plan (FMP). Since the implementation of the closure, NOAA's National Ocean Service has provided grants to the FDA, the states of Maine, New Hampshire, and Massachusetts, and a clam industry representative to collect water and shellfish samples from Federal waters off southern New England. NMFS has also issued exempted fishing permits (EFPs) since 2008 to surfclam and ocean quahog vessels to conduct research in the closure area. Testing of clams on GB by the FDA in cooperation with NMFS and the fishing industry under the EFPs demonstrate that PSP toxin levels have been well below the regulatory limit established for public health safety (FDA 2010). The FDA and NMFS

also developed a Protocol for Onboard Screening and Dockside Testing in Molluscan Shellfish (the protocol) that is designed to test and verify that clams harvested from GB are safe. The protocol was formally adopted into the National Shellfish Sanitation Program at the October 2011 Interstate Shellfish Sanitation Conference.

On June 30, 2010, NMFS published a similar proposal in the Federal Register (75 FR 37745) to re-open a portion of the GB Closed Area. This proposed rule was later withdrawn due to public comments that opposed reopening the GB Closed Area without having a testing protocol in place. Now that the protocol has been formally adopted, NMFS is reopening a portion of the GB Closed Area with the requirement that the protocol be used on all fishing trips into the area.

This action also implements specific reporting requirements for the reopened area. To access the reopened area, a vessel must obtain a letter of authorization (LOA) from NMFS. The LOA outlines the harvesting requirements for the reopened area; by obtaining the LOA, a vessel acknowledges and agrees to the terms and conditions of the protocol and the LOA. Signing up for an LOA also allows NMFS to know which vessels are eligible to fish in the reopened area. NMFS has the authority to invalidate the LOA, should a vessel not comply with the requirements for harvesting in the reopened area. NMFS has also developed new vessel monitoring system (VMS) codes for the area. These codes will allow NMFS and enforcement agencies to readily identify a vessel's intent to fish in the area. The new VMS codes and the LOA will provide NMFS with additional oversight tools to assist enforcement and monitoring efforts in order to ensure public health and safety.

Since research began in the area in 2008, no PSP toxin measurements have been recorded above regulatory limits, and PSP toxin monitoring will be conducted under the terms of the protocol for all trips into the area. NMFS retains the authority to close any area to harvesting of surfclams and ocean quahogs to prevent contaminated shellfish from entering the market. Any future closures or openings within the GB Closed Area will be based upon PSP toxin testing results conducted under the terms of the protocol, the advice of the FDA, and the most current information available.

NMFS reopens the identified portion of the GB Closed Area to the harvest of surfclams and ocean quahogs, under its authority at § 648.76(c). However, we will continue to defer to the FDA in matters of public health and, should we receive new data or advice from the FDA, we may have to reconsider the status of any reopened areas or the need for additional closures.

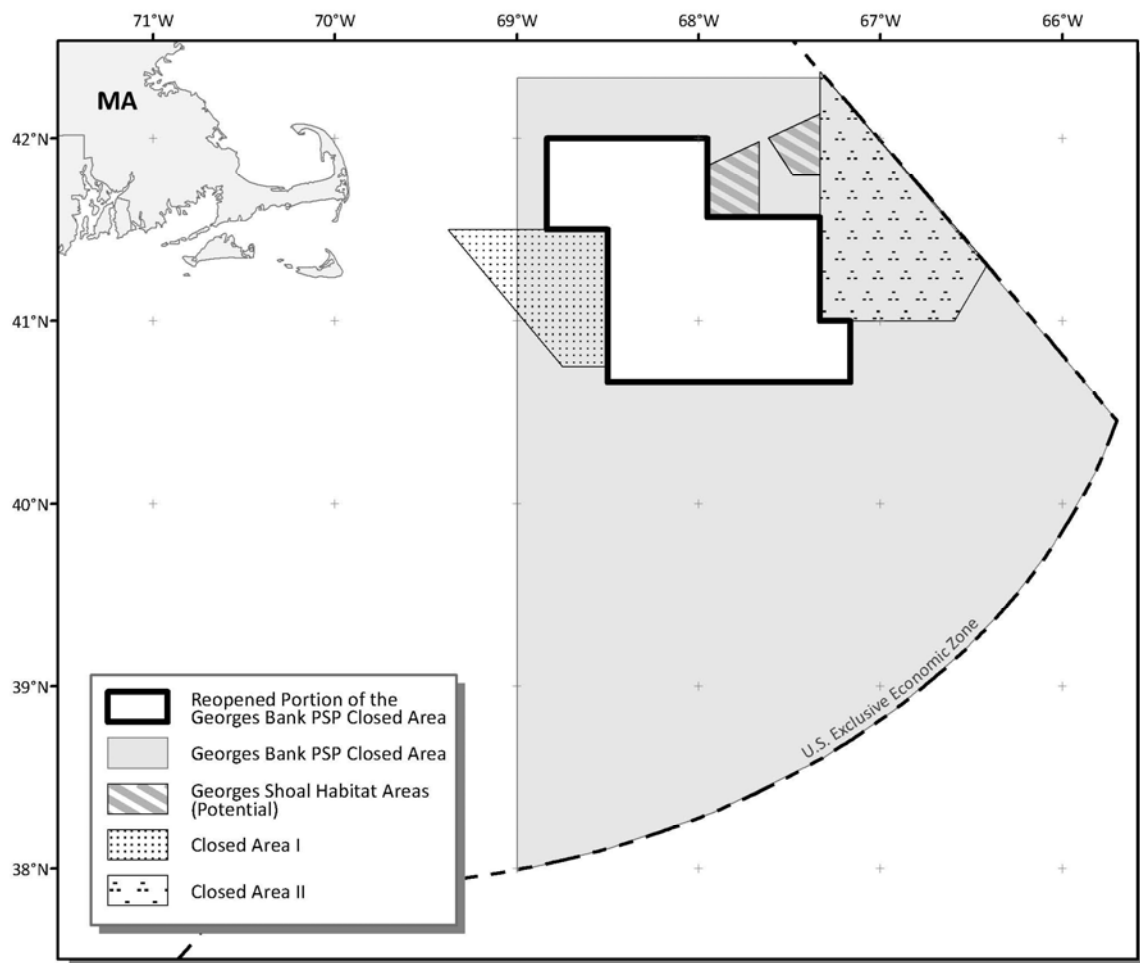
Changes from Proposed Rule

NMFS published a proposed rule for this action in the Federal Register on August 31, 2012 (77 FR 53164), with a 30-day comment period that ended on October 1, 2012. In the proposed rule, three alternatives were identified: Alternative A was the largest of the three, and encompassed the entire area between Closed Area I and Closed Area II; Alternative B was smaller than Alternative A area and encompassed the area defined under the 2012 EFP; Alternative C was the smallest of the three areas, and is known as the Cultivator Shoals area. Due to comments received on the proposed rule, the area being reopened with this interim final rule represents a slight modification to the Alternative A area. The New England Fishery Management Council (NEFMC) submitted a comment informing NMFS that its Habitat Oversight Committee is currently developing Essential Fish Habitat (EFH) Omnibus Amendment 2, which may include potential habitat management areas (HMAs) that, if

implemented, would spatially overlap with the areas initially proposed for reopening. Because of this, NMFS has modified the area that will be reopened with this interim final rule to ensure that there is no overlap with any portion of the potential HMAs. This will allow the NEFMC to continue development of the habitat amendment without additional risk to the potential new HMAs, while also allowing the Atlantic surfclam/ocean quahog fleet to access most of the proposed area. This will prevent any additional Atlantic surfclam/ocean quahog effort from being introduced into the potential HMAs while they are still being developed. After the habitat amendment has been completed, and after NMFS reviews any additional comments on the measures in this interim final rule, NMFS may reconsider the reopened area and will publish a final rule in the Federal Register implementing the final area. In the meantime, the surfclam and ocean quahog fishery can access the majority of the area originally proposed, and the areas of concern to the NEFMC will remain closed pending further comments and/or actions by the NEFMC.

The area being reopened is defined in the table below and illustrated in the map and the remaining portion of the GB Closed Area will remain closed.

Point	N. Latitude	W. Longitude
ROA1	42°00'	68°50'
ROA2	42°00'	67°57'
ROA3	41°34'	67°57'
ROA4	41°34'	67°20'
ROA5	41°00'	67°20'
ROA6	41°00'	67°10'
ROA7	40°40'	67°10'
ROA8	40°40'	68°30'
ROA9	41°30'	68°30'
ROA10	41°30'	68°50'



This interim final rule also includes a clarifying prohibition that was not included in the proposed rule. The additional regulation prohibits the harvest of Atlantic surfclams or ocean quahogs from the reopened portion of the GB Closed Area without being in compliance with the protocol, LOA, and VMS requirements.

Comments and Responses

NMFS received 19 comments on the proposed rule. One comment opposed reopening any portion of the GB Closed Area, but provided no factual basis for the opposition. Eleven comments were in support of reopening the Alternative A area; three were in support of the Alternative C area; and no comments were received specifically supporting the Alternative B area. Generally, all comments received were in support of reopening a portion of the GB Closed Area and were also in support of requiring the testing protocol and corresponding reporting requirements on all trips into the reopened area.

Comment 1: One of the comments voiced support for reopening the Alternative C area, but provided no rationale for this support, and also wanted to ensure a mechanism exists to prohibit access to the reopened area should a vessel not follow the protocol.

Response: With this action, NMFS is also implementing measures that allow for additional oversight of vessels harvesting in the reopened area including mechanisms to control and monitor access. A vessel that wishes to harvest from the reopened areas must obtain an LOA from NMFS. The LOA explicitly outlines the harvesting requirements for the reopened area and by obtaining the LOA the vessel is acknowledging and agreeing to the terms and conditions of the protocol and the LOA, including NMFS's ability to invalidate the LOA, should the vessel not comply with the requirements. Further, NMFS has also developed new VMS codes that are specific to the area. With these codes, NMFS will be able to readily identify a

vessel's intent to fish in the area, requiring the vessel to follow the terms and conditions of the protocol. The new VMS codes will help facilitate enforcement and perform monitoring of the area. Thus, with the protocol, the LOA, and the new VMS codes, NMFS has the necessary mechanisms available to appropriately monitor and enforce the provisions in this rule, including prohibiting a vessel's access to the area, should it become necessary.

Comment 2: Cote Fisheries, Inc., and the Atlantic Offshore Lobstermen's Association provided comments on behalf of the lobster industry in support of the Alternative C area due to concerns regarding potential gear conflicts within the larger Alternative A area. The commenters also raised concerns that hydraulic dredge fishing gear could bycatch soft shell and egg-bearing lobsters. The commenters state that lobster fishing takes place in the southern portion of the area during the summer and autumn months and request that the reopened area should only be reopened seasonally to prevent gear conflicts. Additionally, the commenter expressed concerns about the reopened area frequently closing and reopening, and state that this will encourage derby style fishing and create an unpredictable fishery that make it difficult for fixed gear fisherman to operate with little advanced notice of future closures or reopening.

Response: NMFS acknowledges that gear conflicts between fixed and mobile gear fisherman are ongoing and sharing access to an area can be difficult to coordinate. However, this area is already open to all other types of bottom-tending mobile fishing gear and NMFS does not anticipate that the additional effort will result in substantial additional gear conflicts. Further, surfclam and ocean quahog vessels have been operating in this area under an EFP since 2008, and NMFS is not aware of any ongoing gear conflicts in the area. Reopening the area on a seasonal basis, based on lobster fishing activity, would be inequitable for the surfclam and ocean quahog fleet and could create safety-at-sea concerns. If NMFS were to implement the reopening

on a seasonal basis as requested, the surfclam and ocean quahog fleet would be limited to harvesting in the area in the winter and spring, at a time when the weather offshore is subject to frequent change and is often unsafe for commercial fishing. Further, NMFS does not anticipate that this reopening will create a derby style fishery. The surfclam and ocean quahog fishery is largely market driven and it is unlikely that the market would allow for the flood of product produced by a derby-type fishery. Additionally, there is significant coordination between processors and harvesters in the surfclam and ocean quahog fishery and this would also likely prevent a derby-style fishery. Because the majority of the product in the surfclam and ocean quahog fishery is processed, this fishery typically operates and benefits by supplying the processors with steady and consistent quantities of surfclams and/or ocean quahogs. Although NMFS has the authority to implement future openings or closing, it is not anticipated that the area will be frequently closed and reopened. The protocol was designed to prevent this, but NMFS must retain the authority to close and reopen areas based on environmental conditions, should problems arise beyond what can be handled by the protocol. Therefore, we do not anticipate frequent closures and reopening that would create a derby-style fishery leading to excessive gear conflicts.

As for the lobster bycatch concern, while clam dredge gear may interact to some extent with lobsters, documented incidences of bycatch are very low. Clam dredge gear is towed at very low speeds, allowing most species to avoid the gear, and the unique way clam dredge gear operates typically yields little bycatch. The 1997 NMFS Northeast Fisheries Science Center survey results support that the surfclam and ocean quahog fishery is considered a clean fishery with regard to incidental catch because the target species comprises well over 80 percent of the catch. No fish were caught during the survey, and only sea scallops, representing other

commercially desirable invertebrates, were caught at around 0.5 percent of the total catch. The remaining non-target species caught included a variety of benthic invertebrates, including a variety of crabs, other bivalves, snails, and starfish, among them rock crab, Jonah crab, several species of whelks, and horseshoe crabs. Thus, it is unlikely that reopening the area will produce substantial bycatch of lobster resulting in a negative impact to the fishery.

Comment 3: Two of the comments in support of reopening the Alternative A area were also concerned that NMFS should not have the authority to close or reopen areas based on PSP testing results. The commenters explain that the protocol was designed to prevent frequent and routine closures and reopenings that would result in excessive administrative burden, unnecessarily extending the time between closures and reopenings, which would restrict harvesting.

Response: NMFS understands how the protocol operates and also recognizes the burden involved with the administrative process of closures and reopening, but these processes are necessary precautions to safeguard public health. This authority existed prior to this rulemaking and is part of the Atlantic Surfclam and Ocean Quahog FMP. This is not a new authority being implemented as part of this action. The Regional Administrator's authority to close or reopen an area due to the presence of PSP is not specific to this area, and this authority is necessary should PSP blooms occur in this or other areas. We do not anticipate that routine and frequent closures and openings will occur as a result of this action; rather, this authority is intended for more large-scale and long-term closures. NMFS will continue to defer to the FDA in matters of the public health and, should we receive advice from the FDA, it may be necessary for NMFS to close or reopen any area to the harvesting of surfclams and ocean quahogs to prevent contaminated shellfish from entering the market. It is not NMFS' intention to disregard the effectiveness of

the protocol and frequently implement routine closures and reopening; however, NMFS must maintain this authority to protect public health.

Comment 4: The Massachusetts Department of Public Health, Bureau of Environmental Health, and the Massachusetts Department of Fish and Game, Division of Marine Fisheries, jointly serve as the State Shellfish Control Authority (SSCA) in Massachusetts and submitted a comment in support of Alternative A, provided the SSCA continues to have the flexibility to develop individual agreements with harvesters that may be more stringent than the minimum requirements of the testing protocol.

Response: The protocol that this action is based on will continue to include this flexibility, and thus the Massachusetts SSCA can continue to require additional testing that aligns with its individual agreements.

Comment 5: The NEFMC submitted a comment informing us that its Habitat Oversight Committee is currently developing an Essential Fish Habitat Omnibus Amendment, which may include potential HMAs that, if implemented, would spatially overlap with the areas proposed for reopening. The NEFMC also requested that we extend the comment period on the proposed rule for an additional 60 days to allow them time compose a more formal comment. Oceana also submitted a similar comment requesting that the NEFMC be consulted in this matter.

Response: Due to this comment and the similar comment received from Oceana, NMFS has modified the area that will be reopened through this interim final rule to ensure that there is no overlap with any portion of the potential HMAs. This will also prevent any additional Atlantic surfclam/ocean quahog effort from being introduced into the potential HMAs while they are still being developed. However, NMFS chose not to extend the proposed rule comment period for an additional 60 days. The MAFMC and the surfclam and ocean quahog industry has

requested that this area be reopened by the start of the fishing year on January 1, 2013, and extending the comment period for an additional 60 days would not allow sufficient time to implement this action by January 1. To allow the habitat amendment to be completed, while also allowing the Atlantic surfclam/ocean quahog fleet to access the reopened area, NMFS is publishing this action as an interim final rule, which allows for an additional comment period after the modified area is reopened. After the habitat amendment has been completed, and after NMFS reviews any additional comments on the measures in this interim final rule, NMFS may reconsider the reopened area and will publish a final rule in the Federal Register implementing the final area.

Comment 6: Oceana provided a comment that does not directly oppose any of the area alternatives, but raised a number of concerns. They stated that NMFS does not have the authority to implement this action, and that the action should have been initiated by the MAFMC and should include the entire Council process. The commenter also alleged that NMFS intentionally placed the 30-day comment period between two Council meetings, which prevented the Councils or their committees from commenting.

Oceana also requested that the National Environmental Policy Act (NEPA) analysis accompanying this action be an environmental impact statement (EIS) rather than an EA, stating that NEPA requires that all significant actions go through the public comment, scrutiny, and analysis of an EIS. Their rationale for this is that hydraulic clam dredge fishing gear is among the most destructive gear types and will impact EFH as well as the existing fisheries on GB. The commenter also stated that, because Atlantic surfclams and ocean quahog resources are abundant on GB, the resulting high catch rates will impact the administration of the fishery, including how the fishery is prosecuted, the quota specifications, and overfishing definitions.

Response: In regards to the authority that NMFS is using to take this action, Oceana's comment broadly cites the regulations at § 648.76(c), but their comment quotes the regulations at § 648.76(c)(2), which pertain only to NMFS's authority in implementing short-term emergency closures to prevent adverse effects to public health. However, the authority for this action is found at § 648.76(c)(1). This section pertains to the process for reopening areas and also provides the Regional Administrator with the authority to close or reopen an area provided NMFS publish a Federal Register notice with a 30-day comment period. NMFS published a proposed rule for this action in the Federal Register on August 31, 2012 (77 FR 53164), with a 30-day comment period that ended on October 1, 2012. Therefore, NMFS is authorized to take this action separate from the MAFMC under the Regional Administrator's authority at § 648.76(c)(1). In fact, this action was initiated at the specific request of the MAFMC. Further, the comment period for this action was not deliberately placed between Council meetings. To meet the January 1, 2013, deadline for this action, as requested by the industry and the MAFMC, the comment period needed to be initiated as soon as the proposed rule was fully developed. The 30-day comment period for this proposed rule is the typical length of a comment period for FMP frameworks and amendments. The NEFMC did in fact provide comment on the proposed rule, and the area being reopened is based on the NEFMC's comment.

In response to Oceana's request to complete an EIS rather than an EA, NMFS does not agree that an EIS is necessary for this action. The EA completed for this action is fully compliant with the applicable NEPA requirements and the analysis resulted in a finding of no significant impact, consistent with all applicable guidance and the regulations implementing NEPA; therefore, an EIS is not required and none has been prepared. The commenter's concerns are all addressed in the EA and are also discussed below.

Alternative A has been revised in response to comments received. It excludes the potential Georges Shoal Habitat Areas, which were previously included in the draft EA, as well as Closed Area I and Closed Area II. In regards to Oceana's concern about impacts to other fisheries that occur on GB, the Atlantic surfclam and ocean quahog fishery is considered a clean fishery because the target species comprise well over 80 percent of the catches. Based upon scientific surveys, bycatch typically consists of scallops and other benthic invertebrates. The EA found that reopening the area will result in a net reduction of bycatch, temporarily, for the entire fishery due to the fewer dredges and shorter dredge time anticipated in an area of high biomass such as GB. This fishery is managed under an IFQ, so total fishing effort is capped by the IFQ allocated to the fishery. Because there would be no increase in harvesting permitted, reopening the area would have negligible impacts to the non-target and bycatch species. It is, in addition, highly unlikely that this action will cause any additional gear conflicts with other types of mobile gear, but NMFS acknowledges that gear conflicts between fixed and mobile gear fishermen can be challenging to resolve. However, this area is open already to all other types of bottom-tending mobile gear, including scallop dredges and otter trawls, and NMFS does not anticipate that the additional effort will result in substantial additional gear conflicts with fixed gear fishermen. Further, several surfclam/ocean quahog vessels have been operating in this area under an EFP since 2008, and NMFS is not aware of any ongoing gear conflicts in the area.

Concerning impacts to EFH from hydraulic clam dredge gear, the EA contains a thorough description of hydraulic dredge gear, including a detailed analysis of the impacts to EFH. Other types of bottom-tending gear are currently also used in the subject area, including scallop dredges, trawls, sink gill nets, longlines, pots, and traps. Most of the area for clam dredging where the fishing activity is expected to be concentrated is located in a relatively shallow (30-60

m) part of GB that is routinely highly disturbed by strong tidal currents and wave action from storms. Published studies of the effects of hydraulic clam dredges in high-energy, sandy, habitats, such as those where clam fishing occurs, indicate that, in this type of environment, the affected physical and biological features of the seafloor can be expected to recover from the impacts of this gear in less than a year, and can actually recover within a matter of a few days or months. For this reason, it was determined that the use of this gear would not have significant impacts on EFH in the affected area, because the impacts are minimal or temporary (i.e., ones that are limited in duration and that allow the particular environment to recover without measurable impact). For these same reasons (i.e., because this habitat is highly energetic and recovers relatively quickly), the cumulative impacts from the existing use of bottom trawling and scallop dredging gear together with the expected addition of hydraulic clam dredge gear is also not expected to be significant.

In deeper water, in the southern part of the Alternative A area, habitat recovery times may be longer and the habitat impacts may be more substantial. In addition, because the deeper, southern portion of this area is currently subjected to some bottom trawling and scallop dredging, there could be some cumulative impacts resulting from the three gears being used together in this area. However, because the biomass of surfclams and ocean quahogs is much higher on GB than on the traditional clam fishing grounds in the Mid-Atlantic, hydraulic dredge vessels that move from these grounds to GB to take advantage of the higher concentrations of clams would require less fishing time to achieve their catch quotas and, as a result, the cumulative area of seafloor swept throughout the range of the fishery would very likely be substantially reduced. The positive effect of the net reduction in clam dredging effort would, in all likelihood, mitigate any cumulative impacts of using all three mobile, bottom-tending gears in the fairly small southern

portion of the area. Thus, because quotas are not changing as a result of this action and because catch rates on GB exceed those in the Mid-Atlantic, any shift of clam dredging effort on to GB is expected overall to minimize any adverse direct, indirect, or cumulative impacts of this action on EFH. This conclusion supports a FONSI and, therefore, an EIS is not required. Further analysis of the impacts to the physical environment and habitat including EFH, are discussed at length in sections 5.0 and 6.0 of the EA prepared for this action.

NMFS acknowledges that reopening a portion of the revised GB Closed Area may cause some fundamental shifts in the administration and operations of the fishery; however, the EA prepared for this action includes these considerations in the economic analysis. The area being reopened with this rule is not expected to have an adverse impact on the economy. The reopened area provides a larger area open to the harvest of surfclams and ocean quahogs. In addition, the fishery is managed under an individual transferable quota, and this action does not change the quota. Furthermore, the amount of surfclams and ocean quahogs harvested in the fishery is largely driven by market demand; therefore, it is unlikely that there will be a substantial increase in landings and revenue. The entire allocated quota available for surfclams has not been harvested since 2001. In fishing year 2011, the quota harvested for surfclams and ocean quahog was the lowest to date, 71 percent and 52 percent, respectively. This is another indicator that the fishery is market-limited. Overall, the reopened area is expected to provide a positive economic impact due to the increased area and target species biomass available to harvest surfclam and ocean quahogs, but, because overall catch is not increasing, it is not expected that the positive economic impact will be substantial.

The majority of surfclams harvested in Federal waters are landed in New Jersey and trucked to Delaware for processing. New Jersey, however, has already authorized landings of

clams harvested from the GB area through an EFP that NMFS issued. The EFP authorizes vessels to participate in shellfish harvesting to continue to test the recently approved sampling protocol that was developed by state and Federal regulatory agencies to test for presence of saxitoxins in shellfish. Since New Jersey, Delaware, Massachusetts, and Maine have already authorized landings and processing of clams harvested from the revised GB Closed Area, this action is not expected to have a significant impact on major landing ports and processing plants.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the Assistant Administrator for Fisheries, NOAA, has determined that this final rule is consistent with the Atlantic Surfclam and Ocean Quahog FMP, other provisions of the Magnuson-Stevens Act, and other applicable law.

Pursuant to the Administrative Procedures Act (APA), 5 U.S.C. 553(d)(1), NMFS waives the 30-day delay in effectiveness of this rule because it is a substantive rule that relieves a restriction. This final rule will reopen an area that has been closed to the harvest of surfclams and ocean quahogs since 1990 due to red tide blooms that cause PSP. Because recent testing in the GB Closed Area has demonstrated that PSP toxin levels were well below the regulatory limit established for public health and safety, continued closure of the area is not necessary and could unnecessarily restrict Atlantic surfclam and ocean quahog fishing. Furthermore, NMFS finds good cause to waive the 30-day delay in effectiveness under 5 U.S.C. 553(d)(3). The GB Closed Area has caused harvesting to be limited to the Mid-Atlantic, where Atlantic surfclam and ocean quahog stocks have recently become less abundant. A 30-day delay in effectiveness would continue to prohibit harvest from the GB Closed Area and would continue to put pressure on Mid-Atlantic stocks. Waiving the 30-day delay would allow the GB Closed Area to be reopened

sooner, which could relieve fishing pressure on southern stocks and would allow for greater distribution of Atlantic surfclam and ocean quahog harvest effort in the region. We also received public comment on the proposed rule for this action that fishing is only being continued in the Mid-Atlantic region to maintain the market, and vessels may no longer be profiting. Thus, a delay in effectiveness would continue to limit vessels to harvesting in the Mid-Atlantic region and could result in continued loss of revenue for the Atlantic surfclam and ocean quahog fishing fleet.

Moreover, the industry and the MAFMC have requested that the reopening become effective by the start of the 2013 Atlantic surfclam and ocean quahog fishing year on January 1, 2013. A 30-day delay in effectiveness would result in this action not being implemented by January 1, as requested. Because the industry and MAFMC have requested that the area be reopened by January 1, regulated entities are aware of this action and have likely already begun preparing for the area to be reopened on January 1. Therefore, a 30-day delay in effectiveness would not serve any beneficial purpose.

The Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was provided in the proposed rule that was published on August 31, 2012 (77 FR 53163) and is not repeated here. No comments were received on this certification and no new information has been obtained that would change this determination. As a result, a final regulatory flexibility analysis is not required and none has been prepared.

NMFS prepared an EA for this action that analyzes the impacts of this rule. A copy of the EA is available from the Federal e-Rulemaking portal <http://www.regulations.gov>. Type “NOAA-NMFS-2012-0121” in the Enter Keyword or ID field and click search. A copy of the EA is also available upon request from the NMFS Northeast Regional Administrator, John K. Bullard (see ADDRESSES).

Reporting, Recordkeeping, and Other Compliance Requirements

This final rule contains reporting and recordkeeping requirements and associated information collections subject to the Paperwork Reduction Act (PRA) that have been previously approved by OMB under control numbers 0648–0202 and 0648–0240. Measures implemented by this final rule include provisions that require either new or revised collection-of-information requirements. The protocol includes a detailed procedure outlining how shellfish are to be harvested, tested, and handled. The PSP testing protocol includes the following requirements that require analysis under the Paperwork Reduction Act: Submission of concurrence from the state of landing; maintain and submit harvest records; compile and submit laboratory results; create and maintain a written onboard lot segregation plan; and provide notification prior to unloading.

Additionally, to monitor and control the harvest of surfclams and ocean quahogs from the area, and to ensure vessels adhere to the protocol, vessels fishing in the area are required to apply for and obtain a LOA from NMFS. The LOA will help to ensure that vessels are adhering to the regulations for harvesting within the area and provides a mechanism for NMFS to restrict harvesting in the area should a vessel not comply with the terms and conditions of the LOA and/or the PSP testing protocol. The full protocol is available for viewing at www.nero.noaa.gov/sfd/clams/ApprovedProtocol.pdf.

In regards to the requirement to obtain an LOA, in 2011, there were 47 Federal open-access surfclam and/or ocean quahog permitted vessels that landed surfclams and/or ocean quahogs that may wish to fish in the area proposed to be reopened. Each vessel may apply up to once a year, for a maximum of 47 applications. It is expected that each application will take 5 min to complete, for a fleet maximum of 4 hr. There is no additional public cost associated with this change as the application will be submitted with the previously existing annual permit renewal package.

In regards to the information collection required under the protocol, if all of the permitted vessels in 2011 fished in the area, there would be a total of 47 entities, as well as 11 states, that would be required to adhere to the terms and conditions of the PSP testing protocol. While the PSP testing protocol outlines what is required, there will likely be differences in the complexity of the documents as well as varying methods of submission. For this PRA analysis, it is assumed that the traditional method of submission will be used, physical mail at 45 cents per submission; however, it is likely that many submissions will be completed electronically and, therefore, the overall cost would be reduced.

The testing protocol requires numerous elements that contain collection of information requirements, including elements that are submitted to NMFS, as well as to state and private entities. The submission of concurrence from state of landing element is required only of the state, which total 11 entities. This submission will be in the form of an annual written letter, with a total time burden estimate of 11 hr (11 submissions x 1 hr) and would cost \$5 (11 submissions x \$0.45).

The remainder of the requirements in the protocol apply to individual vessels, and is based on the maximum number of trips that occurred in the area in 2011 (46 trips). Three of

these elements require document submission--one of which is an annual submission, and the other two that are required on each trip. The result is 4,370 submissions ($((47 \times 46) \times 2) + 46$), with a total public cost burden of \$1,967 ($4,370 \times \0.45). The offload notification requirement does not impose any additional costs, as the notification will be completed through a pre-existing email or cellular phone account and is not required to be submitted in writing.

It is estimated that both the requirement to submit and maintain harvest records and compile and submit laboratory test results would take 30 min each to complete. Based on the number of anticipated trips into the area, there would be 4,324 submissions and a public burden of 2,162 hr ($4,324 \text{ submissions} \times 30 \text{ min}$). The element to create and maintain a written onboard lot segregation plan is required annually and will take approximately 60 min to complete for a public burden of 47 hr ($47 \text{ submissions} \times 1 \text{ hr}$). The notification element is required on each trip and is estimated to take 5 min per notification, resulting in 180 hr of burden ($2,162 \text{ notifications} \times 5 \text{ min}$). The total resulting time burden to the public from all of the requirements to fish in the reopened portion of the GB Closed Area is 2,404 hr ($4 + 11 + 2,162 + 47 + 180$).

These estimates include the time required for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 13, 2012

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries,

performing the functions and duties of the

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is amended as follows:

PART 648--FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In § 648.14, paragraph (a)(10)(v) is added to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(10) * * *

(v) Fish for, harvest, catch, possess, or attempt to fish for, harvest, catch, or possess

Atlantic surfclams and ocean quahogs from the reopened portion of the Georges Bank Closed

Area, as defined in § 648.76(a)(4), unless issued a Letter of Authorization, and fishing under the

appropriate VMS declaration and under the terms and conditions of the PSP testing protocol, as specified in § 648.76(a)(4)(i).

* * * * *

3. In § 648.76, paragraph (a)(4) is revised to read as follows:

§ 648.76 Closed areas.

(a) * * *

(4) Georges Bank. The paralytic shellfish poisoning (PSP) contaminated area, which is located on Georges Bank, and is located east of 69° W. long., and south of 42°20' N. lat. is closed to the harvest of surfclams and ocean quahogs. A portion of the Georges Bank Closed Area is reopened to harvest surfclams and ocean quahogs provided the vessel complies with the requirements specified in paragraph (a)(4)(i) of this section. The reopened portion of the Georges Bank Closed Area is defined by straight lines connecting the following points in the order stated:

Point	N. Latitude	W. Longitude
ROA1	42°00'	68°50'
ROA2	42°00'	67°57'
ROA3	41°34'	67°57'
ROA4	41°34'	67°20'
ROA5	41°00'	67°20'
ROA6	41°00'	67°10'
ROA7	40°40'	67°10'
ROA8	40°40'	68°30'
ROA9	41°30'	68°30'
ROA10	41°30'	68°50'

(i) Requirements for Vessels Fishing in the Reopened Portion of the Georges Bank Closed Area. A vessel may fish in the open portion of the Georges Bank Closed Area as specified in this paragraph (a)(4), provided it complies with the following terms and conditions:

(A) A valid letter of authorization issued by the Regional Administrator must be onboard the vessel; and

(B) The vessel must adhere to the terms and conditions of the PSP testing protocol as adopted into the National Shellfish Sanitation Program by the Interstate Shellfish Sanitation Conference. All surfclams and ocean quahogs harvested from the area must be handled in accordance with the terms and conditions of the protocol from the first point of harvest through completion of testing and release by the State Shellfish Control Authority as required by the PSP testing protocol; and

(C) Prior to leaving port at the start of a fishing trip, the vessel's owner or operator must declare its intent to fish in the area through the vessel's vessel monitoring system.

(ii) [Reserved]

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